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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

KYLE KALISH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DOUBLE JEOPARDY CLAUSE PREVENTS THE GOVERNMENT FROM FIRST PROSECUTING, CONVICTING AND PUNISHING PETITIONER FOR CONSPIRACY AND SUBSTANTIVE CRIMES AND THEN, IN A SECOND TRIAL, PROSECUTING HIM FOR A COMPOUND OFFENSE PREDICATED ONLY UPON THE SAME OVERALL CONDUCT FOR WHICH HE HAS ALREADY BEEN TRIED, CONVICTED AND PUNISHED.

II. WHETHER THE DOUBLE JEOPARDY CLAUSE PREVENTS SERIAL PROSECUTIONS OF SUBSTANTIVE CRIMES WHICH ARE PART OF THE SAME CONSPIRACY FOR WHICH PETITIONER HAS ALREADY BEEN TRIED, CONVICTED AND PUNISHED.

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2. Kyle Kalish

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PRAYER

The Petitioner, KYLE KALISH, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on May 29, 1984.

OPINIONS AND JUDGMENTS ISSUED IN COURT BELOW

A true and correct reproduction of the Opinion of the United States Court of Appeals for the Fifth Circuit is annexed as Appendix A. By simply applying the *Blockburger*[1] test, the Fifth Circuit reached the unremarkable

1. *Blockburger v. United States*, 284 U.S. 299 (1932).

conclusion that conspiracy and substantive offenses are not the "same offense" for purposes of Double Jeopardy. That is not now, nor has it ever been, Petitioner's point. Nonetheless, the Fifth Circuit's conclusion that the Government has unbridled discretion in bringing as many prosecutions as it pleases, so long as they are not for the "same offense" under *Blockburger*, is offensive to traditional and present principles of jeopardy. Petitioner still respectfully says that no legitimate purpose can be served when the Government, calculatedly or otherwise, reserves "an ace in the hole" by not charging in one proceeding all crimes that are known to it and properly brought under single indictment. At best, such a practice would lend itself to prosecutorial vindictiveness and retaliation against the citizen accused. It is un-American to think that the Government can "bite at the apple" time and again until its apetite for punishment is satiated.

Petitioner took issue with the opinion by timely filing his Suggestion for Rehearing En Banc, but the same was denied on June 28, 1984. A true and correct copy of the Judgment of the United States Court of Appeals for the Fifth Circuit, as well as its order denying Petitioner's Suggestion for Rehearing En Banc, are annexed hereto as Appendices B and C, respectively.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit became final on June 28, 1984, and, it having affirmed the District Court's denial of Petitioner's Special Plea in Bar based upon Double Jeopardy, jurisdiction of the Honorable Supreme Court is evoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution says:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment at a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

INTRODUCTION

In the face of multiple prosecutions for the same overall conduct, Petitioner filed in the District Court his Plea in Bar and Motion to Dismiss a second indictment, on the ground that the same was barred by the Double Jeopardy Clause. Following the hearing on Petitioner's Special Plea in Bar based upon Double Jeopardy, the District Judge overruled the same but, finding the central issue to be nonfrivolous, severed Petitioner from the trial of other defendants who chose to appear and granted an interlocutory appeal under Title 28, United States Code, § 1291, and the reasoning of *Abney v. United States,* 431 U.S. 651 (1977); *United States v. Dunbar,* 611 F.2d 985 (5th Cir. 1980); and *United States v. Stricklin,* 591 F.2d 1112 (5th Cir. 1979), *cert. den.,* 444 U.S. 963 (1979).

Of all our freedoms and liberties as American citizens, Petitioner's contention here hits home at the most basic: *the right not to be twice placed in jeopardy.*

A. ROUND ONE WITH THE GOVERNMENT. On January 18, 1980, Petitioner was one of many named defendants in Cause No. G-80-3 brought in the United States District Court for the Southern District of Texas, Galveston Division.[2] Specifically, in the "MR. JAKE" case, Petitioner was charged with conspiracy to import marijuana (Count I), conspiracy to possess marijuana with intent to distribute it (Count II), and the substantive offense of possessing marijuana with intent to distribute it (Count III). A true and correct reproduction of the indictment in Cause No. G-80-3 ("MR. JAKE") is set out at Appendix D.

Petitioner Kalish endured the stress and anguish of a lengthy jury trial in the "MR. JAKE" case. In that first round with the Government, Petitioner was acquitted of conspiracy to import marijuana (Count I); however, he was convicted of conspiracy to possess marijuana with intent to distribute (Count II), and possession of mari-

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2. This indictment came to be known as and has been referred to as the "MR. JAKE" trial. It was so named because of an offshore vessel named "MR. JAKE", which was one of several vessels used by overlapping organizations in a single, ongoing conspiracy. See *United States v.* [*Steven*] *Kalish*, 690 F.2d 1144 (5th Cir. 1982), *cert. den.*, 103 S.Ct. 735 (1983), wherein multiple prosecutions of Petitioner's brother, Steven Kalish, for a single conspiracy were held violative of the Double Jeopardy Clause. Specifically, Steven Kalish's conspiracy convictions in the "MR. JAKE" trial were held barred because of his earlier acquittal of conspiracy in what was called the "EL COBRE" (also a vessel) trial. Analyzing such common denominators as time, personnel, offenses, acts charged and *proved* at trial and geography, the Fifth Circuit reasoned that the facts giving rise to seizures of contraband aboard the "EL COBRE" and the "MR. JAKE" were so inextricably interwoven that both were part and parcel of the same overall conspiracy.

juana with intent to distribute (Count III). His punishment was assessed at probation, with supervision, for a period of five (5) years, and he is still currently serving that sentence. See the judgment of Petitioner's conviction in the "MR. JAKE" trial, Cause No. G-80-3, set out at Appendix E.

B. ROUND TWO WITH THE GOVERNMENT. The District Court having decided not to incarcerate Petitioner as a result of his aforementioned convictions upon his first trial, and Petitioner's brother, Steven Kalish, having successfully appealed his conspiracy convictions from the same trial, the Government drew back its fists yet a second time. Partially disguised as a "new" theory, this second indictment charged Petitioner with substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organization Act (referred to as RICO hereinafter), in violation of Title 18, U.S.C. § 1962(c) and (d) [Counts I and II, respectively]; distributing and possessing marijuana with intent to distribute it on December 3, 1979, in violation of Title 21, U.S.C. § 841(a)(1) [Count V]; importing the same quantity of marijuana, in violation of Title 21, U.S.C. § 952 [Count X]; conspiring to import marijuana in violation of Title 21, U.S.C. § 846 [Count XIV]; and conspiring to distribute and possess with intent to distribute marijuana in violation of Title 21, U.S.C. § 963 [Count XIII]. A true and correct reproduction or relevant portions of the aforementioned second indictment in No. B-83-18-CR in the Eastern District of Texas, Beaumont Division, is incorporated herein for all purposes as Appendix F.

At the hearing on Petitioner's Plea in Bar and Motion to Dismiss the Indictment, the Government *conceded* that Counts II, XIII and XIV were *identical conspiracies* to

those litigated at the "MR. JAKE" trial, and the District Court accordingly dismissed those counts.

The Government having conceded jeopardy on those counts, the only counts remaining to be considered are Counts I (substantive RICO), and Counts V and X (substantive allegations of importing marijuana on December 3, 1979 and, on that date, possessing the same with intent to distribute it).

Every alleged predicating act of racketeering "merged" into the "MR. JAKE" conviction because the Government proved all of it before the jury in that first trial in order to convict Petitioner of conspiracy and a substantive offense that was an integral part thereof.[3] Moreover, the alleged acts of racketeering attributed to Petitioner under the second indictment are not new. As to Petitioner, the facts and allegations made in both indictments were known to the Government before the first indictment was returned. It appears that the second indictment was brought solely because the Government was unhappy

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3. The Government has contended that the December 3, 1979, activities (made the basis of Counts V and X, as well as the alleged acts of racketeering) were never formally charged as counts in the "MR. JAKE" indictment and hence, are fair game to serve as both predicate offenses to RICO and independent substantive counts. But every "new" allegation, including specifically the late-May 1979 "JANICE" loads (See 29a-30a at Appendix F), and the December 3, 1979, activity as the "Jasper Farm" (see 30a-32a at Appendix F), not only had the common denominators of geography, offenses and objectives, of the "JANICE" and the December 3, 1979, "Jasper Farm" (alleged "stash" house following all offloading maneuvers) transactions that were part of the overall conduct of the "Kalish organization" for which Petitioner has already been tried and convicted, but were literally encompassed within the time frame of the "MR. JAKE" indictment. Stated another way, proof of the late-May 1979 "JANICE" loads and the December 3, 1979, importation will necessarily require the Government to prove Petitioner was a co-conspirator, an issue that has already been litigated in the first trial and the subject of the doctrine of collateral estoppel.

with the District Court's decision not to incarcerate Petitioner because of his part in the "MR. JAKE" case.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's opinion in this case is in conflict with the recent decision out of the Tenth Circuit in *United States v. Beachner Const. Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984). In that case, Beachner Construction Co., Inc. and Robert Beachner (an officer of the company) were charged with conspiracy to violate the Sherman Anti-Trust Act [alleged bid-rigging of a State highway construction project] and one mail fraud count. Both defendants were acquitted of all charges.

As the Government did with Petitioner Kalish, it indicted the Beachner Company a second time and additionally named Jerry Beachner, also an officer and relative of Robert Beachner. The "Beachner II" indictment charged the defendants with three apparently substantive Sherman Act violations and three substantive mail fraud violations, all regarding three Kansas highway construction projects and all of which concerned construction in counties *other* than that involved in the first indictment.

The Beachner Company moved to dismiss on jeopardy grounds. Following the *Abney*[4] hearing, the District Court granted defendant Beachner Company's motion.

Affirming the District Court's view of the jeopardy issue, Judge Barrett wrote:

> "We hold that a review of the testimony presented at the evidentiary hearing reveals that a common objective was shared by each participating contractor: *to eliminate price competition and ensure*

4. *Abney v. United States, supra.*

> *higher individual profits*. Because the common objective between the contractors has been established in the record, that is sufficient for us to hold that a single conspiracy existed. We do not find any error in the findings of the District Court; hence, there is substantial evidence in the record to support a finding of a single conspiracy. Beachner Company was, therefore, indicted for the same offense in Beachner II that it had previously been acquitted of in Beachner I." 729 F.2d 1278, 1283.

Undaunted, the Government insisted that the three additional *substantive* mail fraud counts each constituted separate offenses and had not been alleged in the first indictment. In answer to this contention, Judge Barrett continued:

> " . . . We further hold that the alleged mail fraud actions *were an integral part of the bid-rigging scheme*. Likewise, the *mail fraud charges are encompassed in the Sherman Act bid-rigging conspiracy charges*. The Beachner I and Beachner II indictments alleged that the scheme to defraud the State of Kansas included (1) Beachner Company's submission to collusive bids to the State and (2) the fact that Beachner Company caused a warrant for payment (check from the State of Kansas) to be delivered through the United States Mail. Thus, in order for the Government to prove the mail fraud charges made in Beachner II, it *must* (emphasis in the opinion) also prove the conspiracy alleged in the Sherman Act counts in the same indictment." 729 F.2d 1278, 1284.

2. Petitioner respectfully says that the Fifth Circuit's opinion calls for an exercise of the Supreme Court's power of supervision in that it has departed from the accepted and usual course of judicial proceedings and has sanctioned the same by the District Court.

3. The Fifth Circuit in this case has decided a unique and previously unaddressed issue of Double Jeopardy which, especially considering the influx of RICO and other compound offense prosecutions, should be settled for the betterment of jurisprudence in this country.

In this connection, one of the issues is whether *post-conviction* jeopardy questions are to be uniformly gauged by an unbending, inflexible application of the *Blockburger* test. The Ninth Circuit, in the wake of reservation and uncertainty, has all but cried out to the Supreme Court for a guiding hand.

The distress signal came in *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1981), wherein Judge Pletcher noticed:

> "The more difficult question is whether the *Blockburger* "same elements" test applies without modification to post-convictions, i.e., government attempts to bring charges that could have been joined with earlier charges but were not.
>
> * * *
>
> "A post-conviction indictment, in contrast, implicates not only the protection against multiple punishments but also the protection against a second prosecution after conviction. This protection arises from the classic Double Jeopardy concerns that a defendant not be forced to 'run the gauntlet' twice. Even if the government could have initially prosecuted the defendant for multiple offenses, further analysis is necessary if it charges him with only one and *holds the others in reserve*. (emphasis added) Policies of assuring finality, sparing defendants the financial and psychological burdens of repeated trials, preserving judicial resources, and prevent prosecutorial

misuse of the indictment process all come into play. *See generally* J. Sigler, *Double Jeopardy,* 156 (1969); *The Supreme Court, 1976 term,* 91 Harv. L. Rev. 70, 108 (1977).

"Many commentators, drawing on these policies, suggest that the *Blockburger* test should be applied only to single prosecutions and not to successive ones. Regarding the latter, they advocate requiring joinder of all charges arising from the same transaction. Charges arising from a single transaction would have to be brought in a single prosecution: those omitted would be waived [footnote omitted]. See, e.g., J. Sigler, *Double Jeopardy,* 222-28 (1969); Note, *The Double Jeopardy Clause, as Bar to Reintrodcing Evidence,* 89 Yale L.J. 962, 967-69, 976-81 (1980); *The Supreme Court, 1976 term,* 91 Harv. L. Rev. 70, 106-114 (1977). This approach, labeled the 'same transaction' test has been adopted by the drafters of the ABA Criminal Justice Standards, ABA *Standards Relating to Joinder and Severance,* Section 1.31(c) (approved draft 1968), and the *Model Penal Code,* American Law Institute, *Model Penal Code* Section 1.08-2(c) (proposed official draft 1962). . . .

"The Supreme Court has never expressly rejected the 'same transaction' test. It has, however, declined to strictly apply the *Blockburger* test to post-acquittal prosecutions, thereby indicating that *Blockburger* is not dispositive of all successive prosecutions citing *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) [fn. omitted].

* * *

"Because *Brown* [*v. Ohio*] does not expand on *Blockburger,* it sheds no light on the standard which should be applied to successive prosecutions. Although *Blockburger* is a useful starting point, such cases involve dangers which seem to require inter-

> position of additional protections. . . . We do not believe that *Brown* should be interpreted as necessarily requiring strict application of the *Blockburger* test to all post-conviction prosecutions. We recognize the many advantages of the same transaction test espoused by Justice Brennan and *might well be moved to adopt it if we had free rein.* [Fn. omitted]."

In closing, the Tenth Circuit looked to *Illinois v. Vitale,* 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). The need for illumination on this issue appears in the following solicitous closing remarks:

> "The *Vitale* court did not discuss the difficult questions raised by post-conviction prosecutions, and we doubt that it intended to resolve them *sub silencio.* Nevertheless, we read *Vitale* as a *tacit* (emphasis added) endorsement of the view that the *Blockburger* test, and nothing more, governs all post-conviction prosecutions. We must, of course, follow the Supreme Court's dictates, however they are expressed. If the law of successive prosecution is to be *modified or clarified* in this or some other more appropriate case, *it will have to be by the Supreme Court and not by this panel."* 637 F.2d 620, 624.

PRIOR DECISIONS OF THE SUPREME COURT WARRANT GRANTING THE WRIT

The Double Jeopardy Clause was designed to prevent the type of abuse here presented. The Government ought not be allowed to prosecute and convict a citizen for conspiracy and integral substantive crimes related thereto, and then force him to undergo a second trial, this time for a compound offense that is predicated only upon overall conduct inextricably tied to the conspiracy for which he has already been convicted and punished.

Simply put, the Government is "bootstrapping" itself not only into a "second bite at the apple", but also into a more severe, compound offense. To be sure, first the Government must avoid the Double Jeopardy prohibition against prosecuting Petitioner for substantive offenses which were an integral aspect of the barred conspiracies; then, solely under the disguise of a RICO indictment, compound the same barred offenses into an ostensibly new substantive charge.[5]

In *Harris v. Oklahoma,* 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), the Supreme Court held that Harris's conviction for the compound offense of felonies, based upon a killing in the course of an armed robbery, barred a subsequent prosecution against Harris for the robbery. The Oklahoma Felony Murder Statute did not necessarily require proof of a robbery to establish felony murder, since other felonys could be used as predicate offenses. The State of Oklahoma, however, conceded that the robbery was in fact the underlying predicate offense. The Supreme Court, *without* resort to *Blockburger,* held that the robbery prosecution was barred under the Double Jeopardy Clause. When considered in conjunction with *Brown v. Ohio,* 432 U.S.

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5. Petitioner notes that, just as with a Continuing Criminal Enterprise as is denounced under Title 21, United States Code § 848, Petitioner's indictment for even the so-called "substantive" RICO is woven out of conspiratorial thread. Cf. *Jeffers v. United States,* 432 U.S. 137, 53 L.Ed. 168, 97 S.Ct. 2207 (1977). In fact, the term "enterprise" as defined by Title 18, United States Code § 1961(4) includes "any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals* associated in fact, although not a legal entity." The point is that, in order to prove the "enterprise", the Government must necessarily prove the conspiracy encompassed within and the subject of the "MR. JAKE" trial. Again, Petitioner has already been punished for his involvement in that (and this) single, unified conspiracy.

161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), the clear rule is: If the prosecution of a compound offense is *in fact* based solely upon a barred predicate, Double Jeopardy is offended. That is the predicament presently before the court.

Contrary to the Fifth Circuit's application, the opinion in *Illinois v. Vitale, supra,* supports Petitioner. *Vitale* was remanded to the State court in part to determine whether there was any basis for the compound offense (involuntary manslaughter) other than the predicate offense for which the accused had already been convicted (failure to reduce speed). The opinion clearly highlights that, if Illinois relies upon the failure to reduce speed as the predicate offense to prove the compound offense, the Double Jeopardy Clause would preclude trial of the compound offense:

> "The state [of Illinois] submits that because it is not necessary to prove a failure to slow to establish manslaughter, the rule of *Brown v. Ohio* [432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)] does not bar its homicide case against *Vitale.*
>
> * * *
>
> "If as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under Blockburger and Vitale's trial on the latter charge would constitute Double Jeopardy under *Brown v. Ohio.*[8]

8. We recognize in *Brown v. Ohio* that 'an exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge *have not occurred or have not been discovered* despite the exercise of due diligence'. This exception is not applicable here because the trial court found that the prosecution was aware that Vitale's accident had resulted in two deaths at the time he was prosecuted for failing to reduce speed.

> In any event, it may be that to sustain its manslaughter case the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. *In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of Double Jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma,* 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977)." *Illinois v. Vitale, supra,* 447 U.S. at pp. 419, 420 (emphasis added)."

The Government, through an abusive strategy, is ignoring the Double Jeopardy Clause. Petitioner requests the Supreme Court to give a breath of life to the Double Jeopardy Clause as it applies to this "bootstrapping" predicament.

Petitioner's second question warrants nationwide attention. Just what are the permissible limits of serial prosecutions for offenses out of the same transaction or series of transactions? Is the Government (and the states, for that matter) free to carve out and reserve separate offenses in the name of *Blockburger* and subsequently, without rhyme, reason or legitimate purpose, subject a citizen to *multiple trials* until, in its opinion, enough punishment has been meeted out? If two successive trials are permissible, then why not three or four?

In *United States v. Ball,* 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), Mr. Justice Story commented that the essence of the Double Jeopardy Clause was "not against being twice punished, but against being twice put in jeopardy." In *Abney v. United States, supra,* the very authority by which Petitioner has been allowed to pursue this interlocutory appeal, Mr. Chief Justice Burger said:

"Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of Double Jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the government suggests. However, this court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishment. It is a guarantee against being twice put to *trial* (emphasis in opinion) for the same offense [fn. omitted].

"The Constitution of the United States, in the Fifth Amendment, declares 'No person shall nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb.' The prohibition is not against twice punished, but against being twice *put* in jeopardy. . . .' . . . The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused will for a second time be convicted of the 'same offense' for which he was initially tried. [citation omitted].

"Because of this focus on the 'risk' conviction, the guarantee against Double Jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense for criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Mr. Justice Black aptly described the purpose of the Clause: 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated at-

> tempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal in compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' [Citation omitted]." 431 U.S. 651, 660-662.

In *Abbate v. United States*, 359 U.S. 187 (1959), the Supreme Court held that the Double Jeopardy provision did not bar the federal prosecution notwithstanding the prior state conviction, but also pointed out that the Double Jeopardy prohibition bars successive federal prosecutions of the same person for the same acts, even though the prosecutions are brought under federal statutes protecting different federal interests:

> "The gist of the [Government's] argument is that two prosecutions are not 'for the same offense' within the meaning of the Fifth Amendment [Double Jeopardy clause] when they are based upon the violation of two statutes designed to vindicate different Governmental interests and requiring different evidence to support convictions * * *.
>
> "The argument then obviously is that the mere fact that there are two statutes which vindicate different interests and require different evidence of itself means that the Fifth Amendment does not prohibit successive prosecutions of the same acts under the respective statutes.
>
> "However, whatever the case under the Fourteenth Amendment as to successive state prosecution, * * * or under the Fifth Amendment as to consecutive federal sentences imposed upon one trial * * *, I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought

under federal statutes requiring different evidence and protecting different federal interests. It is true that this court has said 'where the same act or transaction constitutes the violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' *Blockburger v. U.S.*, 284 U.S. 299. But so far as appears, neither this 'same evidence' test nor a 'separate interest' test has been sanctioned by this court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses *at one trial.* The accused, although punished separately and cumulatively for various aspects of a single transaction, is subject only to one prosecution and one trial. If the Government attempted multiple prosecutions of the same offenses, an entirely different constitutional issue would be presented * * * The basis of the Fifth Amendment protection against Double Jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts * * *.

"Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury being subsequently convicted by another for essentially the same con-

> duct * * *. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justifications for or policy behind the statutes violated by the accused. *If the same acts violate different federal statutes protecting separate federal interests, those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated.*" 359 U.S. 187, 3 L.Ed2d 729, 735-737 (emphasis added).

In a separate opinion, Mr. Justice Brennan voiced his strong convictions about the Double Jeopardy Clause as it relates to the abuses of *serial* trials:

> "I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment, even though brought under federal statutes requiring different evidence and protecting different federal interests... If the same acts violate different federal statutes protecting separate federal interests, those interests can be adequately protected *at a single trial* by the imposition of separate sentences for each statute violated."

In his separate opinion in *Harris v. Oklahoma, supra,* Mr. Justice Brennan took the opportunity to express his views as a proponent of the "same transaction" test discussed in *United States v. Brooklier, supra:*

> "I join the court's opinion but would in any event reverse on a ground not addressed by the court, namely that the state did not prosecute the two informations in one proceeding. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the state through the Fourteenth Amendment, requires the *prosecution in one pro-*

> *ceeding*, except in extremely limited circumstances not present here, of '*all the charges against the defendant that grow out a single criminal act, occurrence, episode, or transaction*', (emphasis added) *Ashe v. Swenson*, 397 U.S. 436, 453-454, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970) (Brennan, J., concurring)." [Citation omitted]. 53 L.Ed.2d at p. 1056.

Finally, Petitioner respectfully says that the Fifth Circuit has turned away from its own precedent insofar as needless and harassing *serial* trials. In *Rodriguez v. United States*, 612 F.2d 906 (5th Cir. 1980), en banc, then Chief Judge Brown wrote:

> ". . . [W]e feel that the Supreme Court in action as well as words [fn. omitted] has recognized that the Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, *at least so long as all charges are brought in a single proceeding.* (emphasis added)
>
> * * *
>
> "We conclude with a cautionary admonition, first, our holding that Double Jeopardy is not offended by these conspiracy charges brought in a single proceeding does not extend to the multiple prosecution area, *and the Government would be well advised to bring all of its charges* (relating to a single conspiracy) *in a single proceeding*. . . ." (emphasis added) 612 F.2d 906, 923-925.

In summary, every facet of the second indictment against Petitioner was not only known to the Government at the time of his first trial in the "MR. JAKE" case, but was offered as proof of those allegations. Thus, the type of "limited circumstances" that Mr. Justice Brennan men-

tioned above are not here present. A fortiori, Petitioner had no control over the second and more severe indictment and did absolutely nothing procedurally that would estop him from claiming jeopardy at a second trial.

Petitioner respectfully says that the Supreme Court should draw the line in the area of *serial* prosecutions of offenses arising out of the same transaction and, for all of the reasons mentioned in *United States v. Brooklier, supra,* says that the "same transaction" test should be adopted and applied uniformly throughout this country. Then and only then will Petitioner Kalish and untold thousands in his posture have some indicia of assurance that their constitutional freedoms against Double Jeopardy will be respected.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Honorable Court will grant this his Application for Writ of Certiorari for the reasons hereinabove stated and that he will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

DEGUERIN & DICKSON

LEWIS DICKSON
Attorney for Petitioner
1018 Preston, 7th Floor
Houston, Texas 77002
(713) 223-5959

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

KYLE KALISH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

CERTIFICATE OF SERVICE

Lewis Dickson, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing three (3) copies of this document in an envelope, first-class postage prepaid and addressed to:

Mr. Robert J. Erickson
Deputy Chief, Appellate Section
Criminal Division
Department of Justice
P. O. Box 899, Ben Franklin Sta.
Washington, D.C. 20044-0899

Mr. Wes Rivers
Assistant U. S. Attorney
Eastern District of Texas
P. O. Box 1510
Beaumont, Texas 77504

and depositing the envelopes in the United States Post Office, San Jacinto Station, Houston, Texas 77002, on August 27, 1984, and further certifies that all parties required to be served have been served.

_____

LEWIS DICKSON

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KYLE KALISH and WILLIAM HARVEY BOREN,
Defendants-Appellants.

NO. 83-2540

United States Court of Appeals,
Fifth Circuit.

May 29, 1984.

Defendants indicted for various drug-related offenses took an interlocutory appeal from an order of the United States District Court for the Eastern District of Texas, Robert M. Parker, J., denying their pretrial motions to dismiss indictment on double jeopardy grounds. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) double jeopardy clause of the Fifth Amendment did not bar Government from first prosecuting defendants for conspiracy to commit certain drug offenses, and then, in a separate proceeding, charging same defendants with underlying substantive drug offense which may have been object of that conspiracy, and (2) in view of fact that there was no double jeopardy protection against prosecution of substantive drug charges underlying conspiracy charges for which Government first prosecuted defendants, no derivative double jeopardy problems attached to racketeering charge against defendants, which used same substantive drug charges as predicate offenses.

Affirmed.

Appeals from the United States District Court for the Eastern District of Texas.

Before THORNBERRY, WILLIAMS and GARWOOD, Circuit Judges.

THORNBERRY, Circuit Judge:

Kyle Kalish and William Boren were indicted in district court for various drug-related offenses stemming from a seizure of 48,000 pounds of marijuana at a farm near Jasper, Texas. Their pretrial motions to dismiss the indictment on double jeopardy grounds were denied and this interlocutory appeal followed. Finding no merit in defendants' claims, we affirm the district court's denial of the motions to dismiss.

The First Prosecution

Kyle Kalish[1] was involved in a marijuana smuggling operation in which participants met "mother ships" in the Gulf of Mexico to unload a cargo of marijuana onto smaller vessels. The smaller boats then deposited the marijuana at various sites along the Texas coast where it was picked up and delivered to a "stash farm" farther inland. In 1980, two separate indictments were returned in federal district court against thirty-three of the participants in this operation.

One indictment involved the seizure of 40,000 pounds of marijuana aboard the shrimp boat, EL COBRE, on December 10, 1979, by a government joint task force. That task force also seized the MR. JAKE, a vessel loaded with 100,000 pounds of marijuana on December

1. We recount only the facts relating to appellant Kalish in this opinion because appellant Boren has adopted Kalish's arguments, asserting that their positions are identical for purposes of this appeal.

19, 1979, which led to a second indictment. Kyle Kalish was named in the MR. JAKE indictment.[2]

Kyle Kalish was tried for (1) conspiracy to import marijuana in violation of 21 U.S.C. § 963; (2) conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846; and (3) possession with intent to deliver marijuana in violation of 21 U.S.C. § 841(a)(1). The conspiracy charges contemplated a time frame starting at an unknown time and continuing up to and including December 19, 1979. The possession charge concerned the MR. JAKE seizure on December 19.

Kalish was convicted of conspiracy to possess with intent to distribute and with the substantive offense of possession with intent to distribute on December 19. He was acquitted of the conspiracy to import charge.

The Second Prosecution

After the MR. JAKE and EL COBRE prosecutions, the government received additional information linking Kalish's group to a larger smuggling venture operating out of Miama. This new evidence led to the indictment in the present case, which names forty-four other defendants. In this indictment, Kalish faces charges for distributing and possessing with intent to distribute 48,000 pounds of marijuana on December 3, 1979, in violation of 21 U.S.C. § 841(a)(1), and for importing the same

2. Kyle Kalish's brother, Steven Kalish, was also prosecuted for his involvement in the smuggling operation. A description of the events surrounding these two indictments is included in the opinion addressing Steven Kalish's appeal. *United States v. Kalish*, 690 F.2d 1144 (5th Cir. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983).

quantity of marijuana in violation of 21 U.S.C. § 952. He is also charged with participating in the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) (the RICO charge).[3]

Kalish moved to dismiss the present indictment on double jeopardy grounds. The district court denied the motion but, finding one of the double jeopardy claims to be non-frivolus, granted the motion for leave to take direct appeal of the order denying the motion to dismiss. Appellants Kalish and Boren were severed from the case, and further action against them was stayed pending appellate determination.

Double Jeopardy

The one issue the district court found to be non-frivolous (although without the support of precedent) was Kalish's claim that the government should have brought all charges arising out of the same transaction in a single proceeding. Kalish argues that the charges arising from the Jasper farm seizure are offenses that were part of the marijuana smuggling conspiracy for which he was prosecuted in 1980.

The substantive offenses of possessing and importing marijuana in the present indictment stem from a seizure of 48,000 pounds of marijuana at a farm near Jasper, Texas on December 3, 1979. The substantive offense for which Kalish was prosecuted in 1980 (possession with intent to deliver marijuana) arose from the MR. JAKE seizure on December 19, 1979. The 1980 conspiracy

3. Originally, the indictment also included conspiracy charges relating to the substanive offenses with which Kalish is charged. The district court, after a hearing on the matter, dismissed these conspiracy charges at the government's request.

charges also stemmed from the MR. JAKE seizure, but the indictment contemplated an ongoing conspiracy ending on December 19, 1979, which seems to have encompassed the December 3, 1979 Jasper farm activities.

Without question, no double jeopardy problems exist concerning the earlier MR. JAKE substantive offenses and the Jasper farm substantive offenses now facing Kalish. Those crimes are entirely distinct. There is also no question that the Jasper farm substantive offenses are offenses that are separate from the 1980 conspiracy offenses in the sense that Kalish could have received separate punishments for those offenses. *See Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 1290, 43 L.Ed.2d 616 (1975) ("Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and the subsequent accomplishment of that end."). Kalish argues, however, that the Jasper farm substantive offenses should have been charged as part of the 1980 conspiracy prosecution because these substantive offenses were part of that conspiracy. The issue to be addressed in this appeal, therefore, is whether the double jeopardy clause bars the government from first prosecuting a defendant for conspiracy to commit a crime, and then, in a separate proceeding, charging the same defendant with an underlying substantive offense which may have been the object of that conspiracy.[4]

The double jeopardy clause provides three protections:

> [It] protects against a second prosecution for the same offense after acquittal. It protects against a

4. We assume for purposes of this analysis that the Jasper farm substantive offenses could be considered to be part of the end to which the 1980 conspiracy was directed.

> second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)).

Kalish argues that the government's prosecution for a substantive offense after an earlier conviction for conspiracy to commit that substantive offense should be barred by the second of the above double jeopardy protections. Analysis of this issue must focus on whether the conspiracy offense and the underlying substantive offense are the "same offense" for purposes of this second double jeopardy protection.

The traditional test for determining whether two offenses arising out of the same act or transaction are the "same offense" for double jeopardy purposes was established in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

52 S.Ct. at 182. The test emphasizes the elements of the two crimes. "If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United*

States, 420 U.S. 770, 95 S.Ct. 1284, 1294 n. 17, 43 L.Ed.2d 616 (1975). Courts have held that the two offenses, conspiracy and the substantive offense which was the object of the conspiracy (the underlying substantive offense), are separate crimes under the *Blockburger* test. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 1294 n. 17, 43 L.Ed.2d 616; *United States v. Brunk*, 615 F.2d 210 (5th Cir. 1980).

Kalish argues, however, that the *Blockburger* test is not the appropriate standard for cases involving separate prosecutions of conspiracy charges and the underlying substantive offenses.[5] This argument must fail in view of the Fifth Circuit's adoption of the *Blockburger* test as the proper standard for double jeopardy questions involving successive prosecutions of conspiracy offenses and underlying substantive offenses.

The Fifth Circuit's position on whether a prosecution for conspiracy could bar a subsequent prosecution for the underlying substantive crime was articulated in *United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979), *panel opinion adopted in relevant part and remanded*, 611 F.2d 985 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980). In *Dunbar*, the defendant had been convicted on an indictment charging a conspiracy to possess Methaqualone with intent to distribute. In another indictment, the defendant was charged with distributing controlled substances in violation of 21 U.S.C. § 841(a)(1). Dunbar argued that, because the same evidence that was

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5. The Supreme Court has recognized that the *Blockburger* test, while applicable to cases involving successive prosecutions, is not the only standard courts have applied to such cases. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 2225-26, 53 L.Ed.2d 187 (1977).

used to convict him in the conspiracy trial would be used against him in the trial for the substantive offense, the double jeopardy clause should bar the second prosecution. In addressing the double jeopardy claim, the court stated:

> A dominant factor in this interlocking procedural situation is that there can be no doubt, absolutely no doubt, that Dunbar's double jeopardy plea was totally devoid of merit. As far as we are aware, no court in this country has ever held that a defendant may not be indicted and tried once for a conspiracy and thereafter tried for the crime of distributing controlled substances, especially where, as here, the drug named in the conspiracy count is not the same as the drugs specified in the substantive counts. [citation omitted] A conspiracy to commit a crime and the crime itself are separate offenses and a defendant may be tried in separate trials for these offenses.

591 F.2d at 1192. The court then stated that the *Blockburger* standard is the classic test for determining whether two offenses are the same for double jeopardy purposes. 591 F.2d at 1192 (quoting *United States v. Smith*, 574 F.2d 308, 309-10 (5th Cir.), *cert. denied*, 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978)). Kalish argues that *Dunbar* does not apply to the present case because its holding was qualified by the fact that the drugs named in the two indictments were not identical. In determining that no double jeopardy problem existed, the court added the phrase, "especially where, as here, the drug named in the conspiracy count is not the same as the drugs specified in the substantive counts." 591 F.2d at 1192. We do not think this phrase was meant to preclude a second prosecution if the drug was the

same as in the first prosecution. Instead, the purpose of the language seems to have been to strengthen the holding in that case, rather than to qualify the Fifth Circuit's position of the issue. This position was clearly stated in *United States v. Brunk*, 615 F.2d 210, 211 (5th Cir. 1980):

> With rare exceptions, conspiracy to commit a crime and the crime itself are separate offenses, outside the restraints of the double jeopardy clause. *Pinkerton v. United States*, 328 U.S. 640, 643-44, 66 S.Ct. 1180, 1181-82, 90 L.Ed. 1489 (1946); *United States v. Mock*, 604 F.2d 341, 344 (5th Cir. 1979). We have opined that this maxim is especially accurate when the drug named in the conspiracy count is not the same as the drug in the substantive count. *United States v. Dunbar*, 591 F.2d at 1192.

The fact that the same drug was named in prosecutions in the present case does not affect the outcome under the *Blockburger* test, nor does it preclude the application of that test to determine whether the offenses are the same for double jeopardy purposes. In *United States v. Garcia*, 589 F.2d 249 (5th Cir.), *cert. denied sub nom., Munoz v. United States*, 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979), the court applied the *Blockburger* test in a situation that was very similar to the present case. In *Garcia*, one of the appellants, Julian Jerrera Mendoza, had been tried earlier on charges of importing marijuana and possessing marijuana with intent to distribute. He was acquitted on the importation charge and convicted on the possession charge. Mendoza was later charged with conspiracy offenses that were related to the previously charged substantive offenses. The court found that

> the offenses of conspiracy to import and to possess marijuana with the intent to distribute and the substantive offenses of importation and possession with intent are sufficiently distinct, with each involving the proof of a fact not required for the conviction of the others. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to satisfy the requirements of the Double Jeopardy clause.

589 F.2d at 251.

Kalish argues that the *Blockburger* test has been discarded in complex conspiracy prosecutions, relying on *United States v. Marable,* 578 F.2d 151 (5th Cir. 1978), and *United States v. Ruigomez,* 576 F.2d 1149 (5th Cir. 1978), and on *United States v. Kalish,* 690 F.2d 1144 (5th Cir. 1982), *cert. denied,* ____U.S.____, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983). Kalish's reliance on those cases is misplaced. Those cases involved a factual inquiry into whether the defendants were being charged with conspiracy twice for a transaction that was in fact only one conspiracy. The concern in those cases was that the government was trying to carve up a large conspiracy into smaller conspiracies and prosecute them separately. *See United States v. Phillips,* 664 F.2d 971, 1009 (5th Cir. 1981), *cert. denied sub nom., Meinster v. United States,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).[6]

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6. Kalish also relies on language from *United States v. Rodriguez,* 612 F.2d 906, 925 (5th Cir. 1980), *aff'd sub nom. Albernaz v. United States,* 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), as support for the proposition that prosecution for his offense must be accomplished in the same proceeding. The court in *Rodriguez* stated, "our holding that double jeopardy is not offended by these conspiracy charges brought in a single proceeding does not extend to the multiple prosecution area, and the Government would be well-advised to bring

[1, 2] The present case does not involve the prosecution of two conspiracy charges; it concerns a conspiracy prosecution followed by a charge for the underlying substantive offense. The appropriate standard for determining whether double jeopardy bars separate prosecutions, therefore, is the *Blockburger* test. *See United States v. Phillips*, 664 F.2d 971, 1005-06; *United States v. Dunbar*, 611 F.2d 985 (en banc court specifically adopting the panel's use of the *Blockburger* test as the proper method to analyze this type of double jeopardy claim). And under the *Blockburger* test, the offenses of conspiracy to commit a crime and the crime itself are separate offenses. *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 1293-94 n. 17, 43 L.Ed.2d 616 (1975).[7]

The RICO Charge

[3] Kalish also argues that the double jeopardy clause should bar prosecution of the RICO charge in this case. Kalish is charged with participating in the affairs of an enterprise through a pattern of racketeering activity in

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all of its charges (relating to a single conspiracy) in a single proceeding." 612 F.2d at 925. This cautionary language was made in the context of a double jeopardy problem involving two *conspiracy* charges. The concern was, once again, that the government would carve up a single conspiracy and prosecute it as separate conspiracies in separate trials.

7. Kalish also seems to confuse the nature of this case with the double jeopardy issue addressed in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). *Ashe* held that a former acquittal barred a subsequent prosecution because the controlling fact in both prosecutions (whether the defendant could be identified as the robber) had been found in the defendant's favor in the first prosecution. The principle of collateral estoppel prevented the state from pursuing a second prosecution in that case.

violation of 18 U.S.C. § 1962(c). As predicate offenses,[8] the RICO charge alleges that Kalish (1) aided and abetted the importation of 30,000 pounds of marijuana in May 1979, and (2) imported, possessed and distributed 48,000 pounds of marijuana on December 3, 1979 (the Jasper farm offenses). Kalish argues that prosecution of these predicate offenses should be barred by the double jeopardy clause because of his earlier prosecution for conspiracy to commit these offenses. Kalish argues that because the predicate offenses have double jeopardy problems, the RICO offense itself should be barred as a violation of the double jeopardy clause. But because we hold that Kalish's earlier prosecution for conspiracy does not bar prosecution of the substantive drug charges, Kalish's argument that the RICO charge is barred must fail.[9] There is no double jeopardy protection against the prosecution of the substantive charges; therefore, no derivative double jeopardy problems attach to the RICO charge which uses the same substantive charges as predicate offenses.

The district court's denial of the motions of appellants Kalish and Boren to dismiss on double jeopardy grounds is affirmed.

AFFIRMED.

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8. One of the elements the government must prove in a substantive RICO charge is that the defendant committed at least two acts of racketeering designated in 18 U.S.C. § 1961(1). *United States v. Phillips*, 664 F.2d at 1011.

9. Although we need not reach the issue, it appears that even if there were double jeopardy problems in prosecuting the predicate offenses independently, the government could still use those acts as predicates for a RICO charge. *See United States v. Phillips*, 664 F.2d at 1015 ("a defendant may be convicted for the predicate acts which form the basis of a RICO charge and subsequently charged under RICO.")

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2540
D. C. Docket No. CR-B-83-18

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KYLE KALISH and
WILLIAM HARVEY BOREN,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Texas

(Filed July 12, 1984)

Before THORNBERRY, WILLIAMS and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 29, 1984

ISSUED AS MANDATE: July 9, 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2540

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

KYLE KALISH and WILLLIAM HARVEY BOREN,
Defendants-Appellants.

Appeal from the United States District Court
For the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion May 29, 5 Cir., 1984, ____F.2d____)

(June 28, 1984)

Before THORNBERRY, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing

en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. WILLLIAMS
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTION DIVISION

CRIMINAL NO. G-80-3

UNITED STATES OF AMERICA

v.

EDWARD M. BECTON, HAROLD BECTON, MAJOR BECTON, STANLEY BECTON, ALBERT ARNOLD BERRY, JACK KEMPER BUSIRK, ADELINO HURTADO CAMACHO, EARNEST ALBERT CROWDER, VINCENT E. DAMION, LARRY PHILLIP DANIELS, JOHN TRISTAN FOLGER, PABLO GARCIA-MENA, DAVID EARL JENKINS, JACKIE THOMAS JENKINS, KYLE TYSON KALISH, MIGUEL LOZANO-GARCES, EDD JOHNSON MARTIN, ALFONSO BARKEAR-MARTINEZ, JUDD WALBRIDGE McCORMACK, TRAVIS EARL McLAUGHLIN, BARRY MIROJNICK, GLENN RAYMOND OWENSBY, ROBERT HOWARD (BOB) POLLACK, PERSIDE RIASCOS-ARAGON, THOMAS SAA-HINESTORZA, JEFFERY KEVIN SARAGOSEY, DANNY WALTER SARTOR, DANNY SHERMAN, a/k/a ZIG ZAG, PHINOUS ERBIN (BUD) STOCKTON, ROGER LEE SWIM, GREGORIO VALLEECILLA-VARELA, PERSIDES VIDAL-CUERO, RICHARD ALLEN YATES, a/k/a DOC, FREDERICK WILLIAM (RICK) ZIMMERMAN, ROBERT JONES, STEVEN KALISH, MARK KALISH

(Filed January 18, 1980)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

From an unknown time and continuing up to and including December 19, 1979, within the Southern District of Texas and elsewhere, the defendants, EDWARD M. BECTON, HAROLD BECTON, MAJOR BECTON, ALBERT ARNOLD BERRY, JACK KEMPER BUSIRK, ADELINO HURTADO CAMACHO, EARNEST ALBERT CROWDER, VINCENT E. DAMION, LARRY PHILLIP DANIELS, JOHN TRISTAN FOLGER, PABLO GARCIA-MENA, DAVID EARL JENKINS, JACKIE THOMAS JENKINS, KYLE TYSON KALISH, MIGUEL LOZANO-GARCES, EDD JOHNSON MARTIN, ALFONSO BARKEAR-MARTINEZ, JUDD WALBRIDGE McCORMACK, TRAVIS EARL McLAUGHLIN, BARRY MIRONJNICK, GLENN RAYMOND OWENSBY, ROBERT HOWARD (BOB) POLLACK, PERSIDE RIASCOS-ARAGON, THOMAS SAA-HINESTORZA, JEFFREY KEVIN SARAGOSEY, DANNY WALTER SARTOR, DANNY SHERMAN, also known at ZIG ZAG, PHINOUS ERBIN (BUD) STOCKTON, ROGER LEE SWIM, GREGORIO VALLECILLA-VARELA, PRESIDES VIDAL-CUERO, RICHARD ALLEN YATES, also known as DOC, FREDERICK WILLIAM (RICK) ZIMMERMAN, ROBERT JONES, STEVEN KALISH, MARK KALISH, did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with diverse other persons to the Grand Jury unknown to commit an offense against the United States, to wit; to violate Title 21, United States Code, Section 952(a).

It was part of said conspiracy that the defendants would knowingly and intentionally import into the United States from a place outside thereof, a controlled substance, to wit; approximately one hundred thousand (100,000) pounds of marihuana, a Schedule I non-narcotic controlled substance.

(Violation: Title 21, United States Code, Section 963)

COUNT TWO

From an unknown time and continuing up to and including December 19, 1979, within the Southern District of Texas and elsewhere, the defendants, EDWARD M. BECTON, HAROLD BECTON, MAJOR BECTON, ALBERT ARNOLD BERRY, JACK KEMPER BUSIRK, ADELINO HURTADO CAMACHO, ERNEST ALBERT CROWDER, VINCENT E. DAMION, LARRY PHILLIP DANIELS, JOHN TRISTAN FOLGER, PABLO GARCIA-MENA, DAVID EARL JENKINS, JACKIE THOMAS JENKINS, KYLE TYSON KALISH, MIGUEL LOZANO-GARCES, EDD JOHNSON MARTIN, ALFONSO BARKEAR-MARTINEZ, JUDD WALBRIDGE McCORMACK, TRAVIS EARL McLAUGHLIN, BARRY MIROJNICK, GLENN RAYMOND OWENSBY, ROBERT HOWARD (BOB) POLLAK, PERSIDE RIASCOS-ARAGON, THOMAS SAAHINESTORZA, JEFFREY KEVIN SARAGOSEY, DANNY WALTER SARTOR, DANNY SHERMAN, also known at ZIG-ZAG, PHINOUS ERBIN (BUB) STOCKTON, ROGER LEE SWIM, GREGORIO VALLECILLA-VARELA, PRESIDE VIDAL-CUERO, RICHARD ALLEN YATES, also known at DOC, FREDERICK WILLIAM (RICK) ZIMMERMAN, ROBERT JONES, STEVEN KALISH, MARK KALISH,

did willfully, knowingly and unlawfuwlly, combine, conspire, confederate and agree with each other and with diverse other persons to the rand Jury unknown to commit offenses against the United States, to wit; to violate Title 21, United States Code, Section 841(a)(1).

It was part of said conspiracy that the defendants would knowingly and intentionally possess with the intent to distribute a controlled substance, to wit; approximately one hundred thousand (100,000) pounds of marihuana, a Schedule I non-narcotic controlled substance.

(Violation: Title 21, United States Code, Section 846)

COUNT THREE

That on or about December 19, 1979, in the vicinity of Freeport, Brazoria County, Texas, in the Southern District of Texas and within the jurisdiction of this Court, the defendants, EDWARD M. BECTON, HAROLD BECTON, MAJOR BECTON, STANLEY BECTON, ALBERT ARNOLD BERRY, JACK KEMPER BUSIRK, ADELINO HURTADO CAMACHO, ERNEST ALBERT CROWDER, VINCENT E. DAMION, LARRY PHILLIP DANIELS, JOHN TRISTAN FOLGER, PABLO GARCIA-MENA, DAVID EARL JENKINS, JACKIE THOMAS JENKINS, KYLE TYSON KALISH, MIGUEL LOZANO-GARCES, EDD JOHNSON MARTIN, ALFONSO BARKEAR-MARTINEZ, JUDD WALBRIDGE McCORMACK, TRAVIS EARL McLAUGHLIN, BARRY MIROJNICK, GLENN RAYMOND OWENSBY, ROBERT HOWARD (BOB) POLLAK, PERSIDE RIASCOS-ARAGON, THOMAS SAAHINESTORZA, JEFFREY KEVIN SARAGOSEY, DANNY WALTER SARTOR, DANNY SHERMAN,

also known as DOC, FREDERICK WILLIAM (RICK) ZIMMERMAN, ROBERT JONES, STEVEN KALISH, MARK KALISH, did knowingly, intentionally and unlawfully and not otherwise authorized or permitted by law, did possess with intent to distribute approximately one hundred thousand (100,000) pounds of marihuana, a Schedule I non-narcotic controlled substance.

(Violation: Title 21, United States Code, Section 841 (a)(1))

A TRUE BILL:

/s/ BEN VAN GILDER
Foreman of the Grand Jury

J. A. "TONY" CANALES
United States Attorney

By: /s/ GEORGE O. JACOBS
George O. Jacobs
Assistant United States Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

v.

KYLE TYSON KALISH

(Filed June 30, 1980)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, June 27, 1980 with counsel Abraham Kazan III pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offenses of conspiracy to possess with intent to distribute a controlled substance, to wit: marijuana, in violation of Title 21, United States Code, Section 846, as charged in Count 2 of the Indictment; and possession with intent to distribute marijuana, in violation of Title 21, United States Code, Section 841(a)(1), as charged in Count 3 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Imposition of sentence is suspended as to Counts 1 and 2, and the defendant is placed on probation, with supervision, for a period of Five (5) Years.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or orther qualified officer.

/s/ HUGH GIBSON
United States District Judge

APPROVED: BEH

Date: June 30, 1980

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

B-83-18-CR

UNITED STATES OF AMERICA

v.

JOSE ANTONIO FERNANDEZ, also known as TONY FERNANDEZ; ARMANDO LOPEZ; JESUS CARNET; JOHN DOYLE, also known as "BIG JOHN"; DAVID BRYDIE MITCHELL; JOSE CARLOS PRADO; REINALDO RABEIRO, also known as REYNALDO RABELLO; RENE ARIAS, also known as "PAPO"; LEOPOLDO SILVA; JORGE CASTILLON, also known as MANUEL BASALLO, also known as MANUEL VASALLO; SAM DAILY TARLO; STEVEN MICHAEL KALISH, also known as STEVE SLOAN; JOSE ALVADO; PHILLIP PIERCE; *KYLE KALISH;* PEDRO ALFONSO; JOSE ANASTASIO COTES-BRUGES, also known as JOSE COTES; LUIS ENRIQUE DARIO COTES, also known as DARIO COTES; JOHN CRAIG DELOZIER, also known as JOHN CURTIS ALLRED; RICHARD HARRIS DELOZIER; DOMINGO GARCIA; CHARLES LARRY GARY, also known as LARRY GARY; CARL KIMBLER; HUGO PINA; JULIO MARESMA, also known as LEO VARGAS; EULALIO FRANCISCO CASTROPAZ, also known as FRANK CASTRO; JUAN FERNANDEZ, also known as INDIO; MIGUEL

ANGEL RAMIREZ, also known as MICHAEL CORLEONE; JOSE SEGURA; BERNARD EUGENE CRISP, also known as "CAPTAIN ARKANSAS"; JOSEPH LEE SEWELL, also known as "PEACH", also known as "PEACHES"; RICHARD ALLEN YATES, also known as "DOC"; TERRANCE LELAND ENGLE, also known as TERRANCE LEE ENGLE, also known as TERRY ENGLE; ROBERT DOTY; ROBERT GRANT PRICE, also known as GRANT PRICE; KELL ATTEBURY PURCELL; CHARLES SCOTT CHILES, also known as SCOTT CHILES; JORGE RUFIN-LUSTRE, also known as JORGE BOLLA, also known as "BOLLA"; LUIS RUFFIN-LUSTRE, also known as LUIS BOLLA, also known as "WICHU"; ROBERT WEBSTER CARY, III; JAMES DANZY; ENRIQUE EMILIO MOYA; JUAN NOVATON; JERRY FISHEL; WILLLIAM HARVEY BOREN

THE GRAND JURY CHARGES:

INDICTMENT

* * *

COUNT 1

VIOLATION: 18 U.S.C. § 1962 (c) and § 1963(a)(1)
PENALTY: Not more than 20 years imprisonment; a fine of not more than $25,000; or both; and criminal forfeiture.

The General Allegations Section of the Indictment is hereby realleged and incorporated by reference as if fully set forth herein.

From approximately late November, 1978, the exact date to the Grand Jury unknown, and continuously thereafter up to and including the month of November, 1980, in the Eastern District of Texas, and elsewhere,

JOSE ANTONIO FERNANDEZ, also known as TONY FERNANDEZ; ARMANDO LOPEZ; JESUS CARNET; JOHN DOYLE, also known as "BIG JOHN"; DAVID BRYDIE MITCHELL; JOSE CARLOS PRADO; REINALDO RABEIRO, also known as REYNALDO RABELLO; RENE ARIAS, also known as "PAPO"; LEOPOLDO SILVA; JORGE CASTILLON, also known as MANUEL BASALLO, also known as MANUEL VASALO; SAM DAILY TARLO; STEVEN MICHAEL KALISH, also known as STEVE SLOAN; JOSE ALVADO; PHILLIP PIERCE; *KYLE KALISH;* PEDRO ALFONSO; JOSE ANASTASIO COTES-BRUGES, also known as JOSE COTES; LUIS ENRIQUE DARIO COTES, also known as DARIO COTES; JOHN CRAIG DELOZIER, also known as JOHN CURTIS ALLRED; RICHARD HARRIS DELOZIER; DOMINGO GARCIA; CARL KIMBLER; HUGO PINA; JULIO MARESMA, also known as LEO VARGAS; MIGUEL ANGEL RAMIREZ, also known as MICHAEL CORLEONE; JOSE SEGURA,

Defendants herein, being persons employed by and associated with an enterprise as defined by Title 18, United States Code, Section 1961(4), engaged in and

the activities of which affected interstate and foreign commerce, to wit: a group of individuals associated in fact, to promote and facilitate the illegal importation and smuggling of multi-ton quantities of marihuana, a Schedule I, non-narcotic controlled substance into the United States from places outside the United States, and the distribution of said marihuana in violation of the laws of the United States, Title 21, United States Code, Sections 841(a)(1) and (b)(6), and 952(a), did unlawfully, willfully, and knowingly conduct and participate directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity.

The pattern of racketeering activity as defined by Title 18, United States Code, Sections 1961(1) and 1961(5), committed by the Defendants in the conduct of the enterprise's affairs consisted of fourteen (14) acts of racketeering activity in violation of Title 18, United States Code, Section 1952, and of Title 21, United States Code, Sections 841(a), 846, 952, and 963 as follows:

ACTS OF RACKETEERING

Acts of Racketeering	*Paragraphs of Count 1*	*Counts of Indictment*
1	a or b	
2	c	
3	d	
4	e or *f or g*	
5	h or i or j	
6	k or l	
7	m or n	
8	o or p	
9	q or r or s or t	
10		3 or 8
11		4 or 9 or 15
12		*5 or 10*
13		6 or 11
14		7 or 12

It was further a part of the pattern of racketeering activity that the following defendants would and did participate in the enterprise's affairs through the commission of the following acts of racketeering activity:

1) JOSE ANTONIO FERNANDEZ, also known as TONY FERNANDEZ as alleged in Acts of Racketeering 1, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 14 of this Count.

2) ARMANDO LOPEZ, as alleged in Acts of Racketeering 4, 5, 6, 7, 9, 11, 12, 13 and 14 of this Count.

3) JESUS CARNET, as alleged in Acts of Racketeering 1, 10, 11, 13 and 14 of this Count.

4) JOHN DOYLE, also known as "BIG JOHN" as alleged in Acts of Racketeering 5, 8, 11 and 14 of this Count.

5) DAVID BRYDIE MITCHELL, as alleged in Acts of Racketeering 4, 6, 8, 11, 13 and 14 of this Count.

6) JOSE CARLOS PRADO, as alleged in Acts of Racketeering 1, 4, 5, 10 and 11 of this Count.

7) REINALDO RABEIRO, also known as REYNALDO RABELLO, as alleged in Acts of Racketeering 10, 11 and 13 of this Count.

8) RENE ARIAS, also known as "PAPO" as alleged in Acts of Racketeering 10, 11, 13 and 14 of this Count.

9) LEOPOLDO SILVA, as alleged in Acts of Racketeering 4, 5, 11, 12 and 14 of this Count.

10) JORGE CASTILLON, also known as MANUEL BASALLO, also known as MANUEL VASALLO, as alleged in Acts of Racketeering 4, 5, 8, 9, 11 and 12 of this Count.

11) SAM DAILY TARLO, as alleged in Acts of Racketeering 4, 5, 6, 8 and 12 of this Count.

12) STEVEN MICHAEL KALISH, also known as STEVE SLOAN, as alleged in Acts of Racketeering 4, 5, 6, 8, 9 and 12 of this Count.

13) JOSE ALVADO as alleged in Acts of Racketeering 12 and 14 of this Count.

14) PHILLIP PIERCE, as alleged in Acts of Racketeering 2, 3, 10 and 11 of this Count.

15) *KYLE KALISH*, as alleged in Acts of Racketeering 4 and 12 of this Count.

16) PEDRO ALFONSO, as alleged in Acts of Racketeering 4, 5, 12 and 14 of this Count.

* * *

(f) That on or about an unknown date in May, 1979, JOSE ANTONIO FERNANDEZ, also known as TONY FERNANDEZ, ARMANDO LOPEZ, JOSE CARLOS PRADO, JOSE SEGURA, SAM DAILY TARLO, DAVID BRYDIE MITCHELL, STEVEN MICHAEL KALISH, also known as STEVE SLOAN, *KYLE KALISH,* PEDRO ALFONSO, JOHN CRAIG DELOZIER, also known as JOHN CURTIS ALLRED, RICHARD HARRIS DELOZIER, JORGE CASTILLON, also known as MANUEL BASALLO, also known as MANUEL VASALLO, MIGUEL ANGEL RAMIREZ, also known as MICHAEL CORLEONE, LEOPOLDO SILVA, and other persons whose names are known and unknown to the Grand Jury did willfully and knowingly import and aid and abet the importation into the United States of America from a place outside of the United States of America, specifically, the vicinity of Colombia, South America, approximately 30,000 pounds of marihuana, a Schedule I, non-narcotic controlled substance, in violation of Title 21, United States Code, Sections 952 and 960(a)(1) and Title 18, United States Code, Section 2.

(g) On or about an unknown date in May, 1979, in the vicinity of Houston, Texas, and elsewhere JOSE ANTONIO FERNANDEZ, also known as TONY FERNANDEZ, ARMANDO LOPEZ, JOSE CARLOS PRADO, JOSE SEGURA, SAM DAILY TARLO, DAVID BRYDIE MITCHELL, STEVEN MICHAEL KALISH, also known as STEVE SLOAN, *KYLE KALISH,*

PEDRO ALFONSO, JOHN CRAIG DELOZIER, also known as JOHN CURTIS ALLRED, RICHARD HARRIS DELOZIER, JORGE CASTILLON, also known as MANUEL BASALLO, also known as MANUEL VASALLO, MIGUEL ANGEL RAMIREZ, also known as MICHAEL CORLEONE, LEOPOLDO SILVA and other persons whose names and identities are known and unknown to the Grand Jury knowingly, intentionally and unlawfully did distribute and possess with intent to distribute, and did aid and abet others in the distribution and possession with intent to distribute a quantity exceeding 1,000 pounds of marihuana, a Schedule 1, nonnarcotic controlled substance; more specifically, approximately 30,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(6) and Title 18, United States Code, Section 2.

* * *

COUNT 5

VIOLATION: 21 U.S.C. § 841 (a)(1) & (b)(6) and 18 U.S.C. § 2
PENALTY: Not more than 15 years imprisonment; fine not more than $125,000; or both; A special parole term of not less than 2 years.

That on or about the 3rd day of December, 1979, in the vicinity of Jasper, Texas, in the Eastern District of Texas, and elsewhere,

JOSE ANTONIO FERNANDEZ also known as TONY FERNANDEZ; ARMANDO LOPEZ; JOSE ANASTASIO COTES-BRUGES also known as JOSE COTES; LUIS DARIO COTES; BERNARD EUGENE CRISP also known as "CAPTAIN ARKANSAS"; STEVEN MICHAEL KALISH also known as STEVE SLOAN; JOSEPH LEE SEWELL also known as "PEACH" also known as "PEACHES"; KELL ATTEBURY PURCELL; PEDRO ALFONSO; JOSE ALVADO; JORGE CASTILLON, also known as MANUEL BASALLO; JOHN CRAIG DELOZIER, also known as JOHN CURTIS ALLRED; RICHARD HARRIS DELOZIER; *KYLE KALISH*; LEOPOLDO SILVA; SAM DAILY TARLO; RICHARD ALLEN YATES, also known as "DOC"; WILLIAM HARVEY BOREN, TERRANCE LELAND ENGLE, also known as TERRANCE LEE ENGLE, also known as TERRY ENGLE

and other persons whose names and identities are known and unknown to the Grand Jury knowingly, intentionally and unlawfully did distribute and possess with intent to distribute, and did aid and abet others in the distribution and possession with intent to distribute a quantity exceeding 1,000 pounds of marihuana, a Schedule 1, non-narcotic controlled substance; more specifically, approximately 48,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(6) and Title 18, United States Code, Section 2.

* * *

COUNT 10

VIOLATION: 21 U.S.C. §§ 952 & 960(a)(1); 18 U.S.C. § 2
PENALTY: Not More than 5 years imprisonment; fine not more than $15,000; or both, A special parole term of not less than 2 years.

That on or about the 3rd and 4th day of December, 1979, in the Eastern District of Texas and elsewhere JOSE ANTONIO FERNANDEZ, also known as TONY FERNANDEZ; ARMANDO LOPEZ; SAM DAILY TARLO; JOSE ALVADO; JOSE ANASTASIO COTES-BRUGES, also known as JOSE COTES; LUIS ENRIQUE DARIO COTES, also known as DARIO COTES; JOHN CRAIG DELOZIER, also known as JOHN CURTIS ALLRED; RICHARD HARRIS DELOZIER; *KYLE KALISH;* STEVEN MICHAEL KALISH, also known as STEVE SLOAN; BERNARD EUGENE CRISP, also known as "CAPTAIN ARKANSAS"; JOSEPH LEE SEWELL, also known as "PEACH", also known as "PEACHES"; RICHARD ALLEN YATES, also known as "DOC"; PEDRO ALFONSO; TERRANCE LELAND ENGLE, also known as TERRANCE LEE ENGLE, also known as TERRY ENGLE; WILLIAM HARVEY BOREN, also known as "CAPTAIN BILLY", LEOPOLDO SILVA; JORGE CASTILLON, also known as MANUEL BASALLO, also known as MANUEL VASALLO;

and other persons whose names are known and unknown to the Grand Jury did willfully and knowingly import and

aid and abet the importation into the United States of America from a place outside of the United States of America, specifically, the vicinity of Colombia, South America, approximately 48,000 pounds of marihuana, a Schedule I, non-narcotic controlled substance, in violation of Title 21, United States Code, Sections 952 and 960 (a)(1) and Title 18, United States Code, Section 2.

* * *

Office-Supreme Court, U.S.
FILED
JAN 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-316

In the Supreme Court of the United States

OCTOBER TERM, 1984

KYLE KALISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars successive prosecutions for conspiracy and a substantive offense occurring in the course of the conspiracy.

2. Whether the Double Jeopardy Clause bars a prosecution for a substantive violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(c), where the charged acts of racketeering were substantive offenses that occurred in the course of a conspiracy for which the defendant was previously prosecuted.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-316

KYLE KALISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 734 F.2d 194.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on May 29, 1984. A petition for rehearing was denied on June 28, 1984 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on August 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that his prosecution in this case for substantive drug and racketeering offenses violated the Double Jeopardy Clause because those offenses occurred in the course of a conspiracy for which petitioner had previously been convicted. The district court rejected this contention, and, on petitioner's interlocutory appeal, the court of appeals affirmed (Pet. App. 1a-12a).

1. In January 1980, petitioner and 35 co-defendants were indicted in the Southern District of Texas — the so-called *Mr. Jake* indictment (No. G-80-3) (Pet. App. 16a-20a) —for drug offenses arising out of their unsuccessful effort to smuggle 100,000 pounds of marijuana into the United States from the load ship *Mr. Jake* on December 19, 1979. Following a jury trial, petitioner was convicted of conspiracy to possess marijuana with intent to distribute it (Count II) and possession of marijuana with intent to distribute it (Count III); he was acquitted of conspiracy to import marijuana (Count I) (E.R. 10).[1] The court of appeals subsequently affirmed petitioner's convictions without opinion. See *United States* v. *Saa-Hinestorza*, 689 F.2d 190 (5th Cir. 1982) (Table).[2]

2. a. Subsequently to the *Mr. Jake* prosecution, the government received additional information linking petitioner to a large-scale marijuana smuggling venture operating out of Miami and coordinated by the Jose Fernandez organization. As part of this venture, the organization headed by petitioner's brother Steven Kalish, of which petitioner was a member, was regularly used to off-load shipments of imported marijuana.

Based on this additional information, the 20-count indictment (No. B-83-18-Cr.) in the instant case was returned in the Eastern District of Texas on June 28, 1983

---

[1]"E.R." refers to the Excerpts of Record in the instant appeal; "R.A." refers to the Record on Appeal; "S.R." refers to the Supplemental Record.

[2]The evidence underlying the *Mr. Jake* prosecution is summarized in *United States* v. *Kalish*, 690 F.2d 1144, 1148-1150 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983). Briefly stated, it showed that petitioner's brother, co-defendant Steven Kalish, met with Tommy Troutwein, a marina manager and confidential informant, between August and December, 1979, to arrange for the offloading of a mother ship carrying marijuana. For his part, petitioner participated in the offloading of the *Mr. Jake* on December 19, 1979.

(Pet. App. 23a-33a). This indictment charged petitioner and 44 co-defendants with various offenses for their participation in a widespread and continuing marijuana importation and distribution enterprise that was in operation between November 1978 and November 1980. In pertinent part, petitioner was charged with distributing and possessing with intent to distribute 48,000 pounds of marijuana on December 3, 1979 (Count V), in violation of 21 U.S.C. 841(a)(1), and importing the same quantity of marijuana (Count X), in violation of 21 U.S.C. 952; these counts were based on a seizure of the marijuana at a farm near Jasper, Texas. Petitioner was also charged with participating in the affairs of an enterprise through a pattern of racketeering activity (Count I), in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). As predicate acts of racketeering, the substantive RICO count alleged that petitioner aided and abetted the importation of 30,000 pounds of marijuana in May 1979 and that he imported, possessed, and distributed 48,000 pounds of marijuana on December 3, 1979 (Pet. App. 27a-30a). The offenses charged in the *Mr. Jake* indictment were not alleged as predicate acts in the RICO count.[3]

---

[3]The indictment also listed petitioner as a participant in the importation of 11,000 pounds of marijuana on May 27, 1979 (Act of Racketeering No. 5, ¶¶ (h) and (i); E.R. 11); however, his involvement in this transaction was not alleged as a predicate act in the RICO count. See I R.A. 12.

In addition to these substantive drug and RICO offenses, petitioner was also charged with conspiracy to distribute (Count XIII) and to import (Count XIV) marijuana between November 1978 and November 1980, in violation of 21 U.S.C. 846 and 963, and with conpiracy to participate in the affairs of an enterprise through a pattern of racketeering activity (Count II), in violation of 18 U.S.C. 1962(d). The government conceded that prosecution on the drug conspiracies charged in Counts XIII and XIV was barred by double jeopardy (see I R.A. 184, 186; I S.R. 8-9), and the district court dismissed these counts at the government's request (I R.A. 253). Without conceding that the RICO

b. Prior to trial, petitioner moved to dismiss the instant indictment on double jeopardy grounds. He argued that the prosecution was constitutionally barred because of the previous trial on charges of conspiring to import, possess, and distribute marijuana (I R.A. 131-138). After a hearing, the district court denied petitioner's motion to dismiss the substantive RICO and controlled substances counts (I R.A. 253). The court found petitioner's challenge to the substantive RICO charge to be "completely devoid of merit" since

> [u]nder this charge, [petitioner] is accused of having furthered [a] criminal enterprise through a pattern of racketeering activity. Such being the case, the overt acts mentioned do not stem from predicate substantive crimes, but rather the furthering of the illegal business enterprise. In essence, a RICO substantive charge alleges the commission of on-going, continuing criminal activity as opposed to the commission of any specific predicate offense.

I R.A. 257.[4]

The court found "equally frivolous" petitioner's attack on the substantive distribution and importation counts arising from the marijuana smuggling activity on December 3, 1979 (I R.A. 257). As the court explained, reference to the December 3 transaction "is completely absent from the 'Mr. Jake' * * * record[]"; accordingly, the instant substantive

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conspiracy count was necessarily barred by double jeopardy, the government also moved to dismiss Count II in order to eliminate any potential litigating problems (I R.A. 188), and the district court granted this motion (I R.A. 253).

[4]As the court also noted at the hearing (II R.A. 14), petitioner

> ha[d] never been charged or convicted in any Court * * * of any substantive conduct arising out of the May [1979] incident alleged in the act of racketeering, nor has he ever been tried or convicted of any conduct arising out of the December 3rd transaction alleged in the indictment.

counts "are completely distinct from those [on] which [petitioner] w[as] either convicted or acquitted in earlier proceedings" (I R.A. 257-258). The court also rejected petitioner's claim that all possible charges relating to a single conspiracy must be brought in one prosecution (I R.A. 258-259):

> The law is clear and without challenge as to the separate prosecution of a conspiracy and the underlying substantive offense arising out of the conspiracy. The prosecution of a conspiracy is distinct from that of the substantive offense; and prosecution of one will not bar prosecution for the other.

Thereafter, the district court denied petitioner's motion for reconsideration (I R.A. 260) but stayed further proceedings and certified an interlocutory appeal (I R.A. 267), stating that petitioner's argument that all charges growing out of the same transaction must be tried together, "though without support of precedent," was "non-frivolous" (I R.A. 260). See *Richardson* v. *United States*, No. 82-2113 (June 29, 1984), slip op. 5-6, 9 n.6; *Abney* v. *United States*, 431 U.S. 651 (1977); *United States* v. *Dunbar*, 611 F.2d 985 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980).

c. On petitioner's appeal, the court of appeals affirmed the district court's order rejecting petitioner's double jeopardy challenges to the substantive drug and racketeering counts in the indictment (Pet. App. 1a-12a). The court observed that the substantive drug offenses in this case and in the *Mr. Jake* prosecution "are entirely distinct" (*id.* at 5a); the former "stem from a seizure of 48,000 pounds of marijuana at a farm near Jasper, Texas on December 3, 1979," while the latter "arose from the MR. JAKE seizure on December 19, 1979" (*id.* at 4a). In addition, even assuming that the Jasper farm substantive offenses in this case were among the objects of the conspiracy for which petitioner was prosecuted in the *Mr. Jake* case (*id.* at 5a n.4), the

court held that successive prosecutions for conspiracy and a substantive object offense do not violate double jeopardy (*id.* at 8a; citation omitted):

> [N]o court in this country has ever held that a defendant may not be indicted and tried once for a conspiracy and thereafter tried for the crime of distributing controlled substances * * *. A conspiracy to commit a crime and the crime itself are separate offenses and a defendant may be tried in separate trials for these offenses.

Finally, the court concluded that the *Mr. Jake* prosecution for conspiracy did not bar the substantive RICO count here; because there was no double jeopardy problem with the substantive drug offenses alleged as acts of racketeering, "no derivative double jeopardy problems attach to the RICO charge" (*id.* at 12a).

ARGUMENT

1. Petitioner contends that the Double Jeopardy Clause bars successive prosecutions for conspiracy and a substantive offense that occurred in the course of the conspiracy. However, double jeopardy prevents two proceedings only where they involve "the same offense."[5] This Court[6] and the courts of appeals[7] have long recognized that conspiracy and

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[5]See, *e.g.*, *United States* v. *Ewell*, 383 U.S. 116, 124-125 (1966).

[6]See, *e.g.*, *Jeffers* v. *United States*, 432 U.S. 137, 156-157 (1977) (plurality opinion); *Iannelli* v. *United States*, 420 U.S. 770, 777-779, 785-786 n.17 (1975); *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); *Carter* v. *McClaughry*, 183 U.S. 365 (1902).

[7]See, *e.g.*, *United States* v. *Nichols*, No. 83-3511 (5th Cir. Sept. 17, 1984), slip op. 5662-5663; *United States* v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Bosch*, 584

substantive offenses are not the same for double jeopardy purposes. Indeed, this rule applies even where the substantive offense is both alleged as an overt act for the conspiracy and charged as a separate count in the indictment.[8] Accordingly, the *Mr. Jake* prosecution on the conspiracy offense and the Jasper prosecution on the substantive drug offenses were not unconstitutional.

Petitioner nowhere mentions this settled double jeopardy principle. Instead, relying (Pet. 16-19) on two concurring opinions of Justice Brennan,[9] he argues that the Double Jeopardy Clause requires all charges arising out of "the same transaction" to be brought in a single proceeding. However, "[i]t is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause." *Albernaz* v. *United States*, 450 U.S. 333, 344-345 n.3 (1981). The defendant is not subjected to double jeopardy where "the transaction charged is the same in each case * * * [but] the offenses are separate. * * * 'The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.' " *Gavieres* v. *United States*, 220 U.S. 338, 342 (1911)

F.2d 1113, 1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 918-920 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Inmon*, 568 F.2d 326, 329-333 (3d Cir. 1977); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Ricco*, 549 F.2d 264, 272-273 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791-792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

[8]See *Pinkerton* v. *United States*, 328 U.S. at 644.

[9]See *Harris* v. *Oklahoma*, 433 U.S. 682, 683 (1977) (Brennan, J., concurring); *Abbate* v. *United States*, 359 U.S. 187, 196-201 (1959) (separate opinion of Brennan, J.).

(citation omitted). As Justice Brennan has recognized,[10] the Court has never adopted the "same transaction" test.[11] Petitioner has offered no reason for the Court to revisit this issue or to reconsider the well-established doctrine that conspiracy and substantive crimes are different offenses that may be prosecuted in separate proceedings.

Indeed, petitioner's position is especially unsound here. First, the substantive drug offenses with which petitioner was charged occurred in different judicial districts (see Pet. App. 19a, 30a, 32a) and therefore could not have been joined in one venue. Moreover, the instant prosecution was based on "additional information" (Pet. App. 3a) that the government received after the *Mr. Jake* prosecution had been concluded. In these circumstances, as we discuss in our brief on the merits (at 38-45) in *Garrett* v. *United States*, cert. granted, No. 83-1842 (Oct. 1, 1984),[12] the Double Jeopardy Clause would not bar successive prosecutions even if it contained a "same transaction" requirement.

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[10]See *Borchardt* v. *United States*, cert. denied, No. 83-1643 (Oct. 29, 1984), slip op. 4, 5 n.3 (Brennan, J., dissenting); *Thompson* v. *Oklahoma*, cert denied, 429 U.S. 1053 (1977) (Brennan, J., dissenting).

[11]For example, the Court's decision in *Illinois* v. *Vitale*, 447 U.S. 410 (1980), recognized that offenses involving the same transaction were not required to be prosecuted together if they were neither greater-and-lesser nor compound-predicate offenses under state law. Similarly, in *Harris* v. *Oklahoma, supra*, the Court, in setting aside a conviction for the underlying felony following a prosecution and conviction for felony-murder, did not suggest in any way that offenses growing out of the same transaction had to be joined in one trial (cf. *Whalen* v. *United States*, 445 U.S. 684, 694 (1980)); on the contrary, Justice Brennan's concurring opinion (433 U.S. at 683) makes clear that the Court's decision did not rest on the "same transaction" test. See also, *e.g.*, *United States* v. *Brooklier*, 637 F.2d 620, 624 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *United States* v. *Dunbar*, 591 F.2d 1190, 1192 (5th Cir. 1979), aff'd, 611 F.2d 985, 987 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980).

[12]A copy of our brief in *Garrett* is being sent to counsel for petitioner.

However, because prosecutions for conspiracy and a substantive offense do not violate double jeopardy even apart from this argument, the Court need not defer consideration of petitioner's contention pending the decision in *Garrett*.

Finally, petitioner argues that the decision below conflicts with *United States* v. *Beachner Const. Co.*, 729 F.2d 1278 (10th Cir. 1984). There, the defendant was initially indicted on one count of conspiracy to rig a contract bid, in violation of the Sherman Act (15 U.S.C. 1), and on one count of mail fraud in furtherance of that bid-rigging, in violation of 18 U.S.C. 1341; these charges related to a specified state highway construction project. Following acquittal on those charges, the defendant was indicted on three counts of conspiracy to rig bids and three counts of mail fraud in furtherance thereof; these charges related to three state construction projects that had not been involved in the first prosecution. The court of appeals held that there had been one overall conspiracy that encompassed the various bid-rigging incidents, and accordingly it held that the two sets of conspiracy charges constituted the same offense and could not be successively prosecuted. In addition, the court held that the second set of mail fraud counts was also barred. As one of the alternative grounds for this decision,[13] it stated that the mail fraud counts "were an integral part of the alleged bid-rigging scheme" and were "encompassed in the Sherman Act bid-rigging conspiracy charges" (729 F.2d at 1284); since "in order for the government to prove the mail fraud charges made in [the second prosecution] it *must* also prove the conspiracy alleged in the Sherman Act counts" (*ibid.*; emphasis in original), and since that conspiracy was the same offense as that tried in the first proceeding, the court held that the second set of mail fraud counts

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[13]The court also concluded (729 F.2d at 1284) that the government failed to preserve its arguments in the district court.

was equally precluded by double jeopardy as the second set of conspiracy charges. Relying on this ruling, petitioner argues that his prosecution for substantive drug offenses was likewise improper in light of his earlier prosecution for conspiracy.

While we believe that the decision in *Beachner* is manifestly incorrect in view of the authorities discussed earlier, it does not conflict with the court of appeals' decision below. The court in *Beachner* did not discuss, let alone put in doubt, the firmly settled proposition that conspiracy and substantive offenses are not the same under the Double Jeopardy Clause. Rather, the court found that the government, in order to prove the mail fraud counts in the second proceeding, had to establish as an essential part of its case the Sherman Act conspiracy violations that could not be directly prosecuted. In effect, the court appeared to interpret the mail fraud charges to be a form of compound-predicate offense in which proof of the underlying bid-rigging conspiracy was necessary to show the scheme to defraud (see 729 F.2d at 1284); absent the conspiracy, the mailings would not have been fraudulent. Here, on the other hand, it is not essential to the substantive drug charge that petitioner was engaged in the *Mr. Jake* conspiracy; while the government's evidence may tend to demonstrate such a conspiracy, that is not a necessary part of its burden. For this reason, the relationship between the offenses at issue here is fundamentally different from that in *Beachner*, and the decisions do not create a conflict that warrants further review in this case.

2. Petitioner also argues that, because the substantive drug offenses could not be separately prosecuted, they likewise could not serve as the acts of racketeering for the substantive RICO charge in this case. As discussed above, however, the Double Jeopardy Clause did not bar the substantive drug counts, and therefore petitioner's argument must fail.

Moreover, we agree with the suggestion of the court of appeals (Pet. App. 12a n.9) that the RICO count would be permissible even if the acts of racketeering could not be separately charged as substantive offenses. In our view, RICO and the predicate crimes are not "the same offense," and hence a defendant may be successively prosecuted for those substantive offenses and for RICO. This is similar to the issue of successive prosecutions for substantive drug offenses and engaging in a continuing criminal enterprise (21 U.S.C. 848), which is before the Court in *Garrett* v. *United States, supra*. As discussed in our brief in *Garrett* (at 14-32), a complex compound-predicate offense is not the same offense as the underlying substantive crimes. In line with this analysis, the courts of appeals have uniformly concluded that RICO and the acts of racketeering are separate offenses (see U.S. *Garrett* Br. 21 n.11, 48-49 n.42). Furthermore, all of the substantive drug charges against petitioner could not have been brought in one venue, and the instant prosecution was based on information that the government did not have at the time of the *Mr. Jake* proceeding (see page 8, *supra*). In this situation, as we discuss in our brief in *Garrett* (at 38-45), the Double Jeopardy Clause does not prohibit successive prosecutions.

It is unnecessary, however, for the Court to hold this petition pending decision in *Garrett*. As discussed above, the predicate acts of racketeering here are not offenses for which petitioner has previously been prosecuted. Thus, whatever the outcome in *Garrett*, petitioner's RICO prosecution would be valid. Nor is there a conflict among the circuits on the propriety of successive prosecutions for RICO and the substantive predicate offenses. Accordingly, the RICO issue raised by petitioner does not require this Court's review, and the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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